STATE OF MICHIGAN

COURT OF APPEALS

BILL LESTER,

Plaintiff-Counterdefendant-Appellee,

v

VICTOR YARASH,

Defendant-Counterplaintiff-Appellant.

UNPUBLISHED
January 7, 2000

No. 213878
Livingston Circuit Court
LC No. 97-16047 CK

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant property owner Victor Yarash appeals as of right from a July 30, 1998 order granting summary disposition to plaintiff purchaser Bill Lester. We reverse and remand for further action.

This case arises out of a May 25, 1997 contract for the sale of real property that included a contingency clause that states:

> 15. This offer to purchase and subsequent closing of the real estate shall be contingent upon the following conditions. A purchaser obtaining from the Livingston Co Health Dept. approval for perk test for septic tank and drain field disposal systems, all cost to be borne by the purchaser. Approval to be obtained within 30 days.

Plaintiff added this section to the contract, with the exception of the last clause inserting a thirty-day limit, which defendant added.

A perk test, which is a soil test done to check its ability to support a septic system, was performed on June 17, 1997. The results revealed that the property could not support high-density residential development, but did not preclude other types of development of the land such as light industrial or low-density residential. Up to this point, the facts are undisputed. However, the parties' versions differ as to what occurred after the perk test was completed.

Plaintiff states that he was prepared to close on the property within the thirty days from signing as specified in the contract. He also requested, immediately after the test, a thirty-day extension in order to obtain another perk test, but that extension request did not affect nor reflect plaintiff's willingness to proceed with the purchase of the property. Within a couple of days of the June 17, 1997 perk test, plaintiff contacted a civil engineer to prepare a site plan. The engineer wrote a proposal letter dated June 20, 1997 to plaintiff's agent discussing a plan for a residential development on the twenty-acre parcel. Plaintiff's agent gave a copy of this letter to defendant to show that plaintiff was prepared to move forward on this deal. Within one to two weeks of giving this proposal letter to defendant, plaintiff's agent was trying to finalize a closing date with defendant. However, defendant repeatedly put off plaintiff's agent and avoided him.

Defendant agrees that plaintiff's agent contacted him repeatedly after the June 17, 1997 perk test. However, defendant stated during a deposition that closing was not discussed, but only that plaintiff was seeking a thirty-day extension. Defendant's deposition testimony differs from the facts presented in his countercomplaint filed with the circuit court in September 1997. There, defendant referred to the multiple calls from plaintiff between June 18 and June 20 asking for an extension, but stated also that the parties discussed closing. Defendant further asserted that plaintiff told him that he would not close if an extension was not granted and if a second perk test did not support high-density residential development of the property. Defendant also stated in the countercomplaint that he was willing to grant an extension if plaintiff reaffirmed the contract. This contradicts defendant's attorney's deposition testimony that when plaintiff's agent asked him three times in late June and July 1997 to persuade defendant to grant an extension, defendant outright refused to grant the extension.

At the end of that first week after the perk test, a third party offered defendant $87,000 more than the contracted price with plaintiff. That offer was increased by $25,000 at the end of July.

Plaintiff moved the circuit court to grant summary disposition in his favor. In granting summary disposition to plaintiff, the circuit court stated that because defendant never pressed plaintiff for a closing date, plaintiff did not reject the purchase contract, and that if plaintiff wanted to enforce the contract now, then specific performance was appropriate.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Russell v Dep't of Corrections*, 234 Mich App 135, 136; 592 NW2d 125 (1999). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

In the present case, there are many disputed facts. Plaintiff states that immediately after the perk test was completed, he told defendant that he wanted to buy the property. Defendant states that plaintiff said that he would not close unless defendant granted a thirty-day extension so plaintiff could

obtain another perk test. Plaintiff stated that he did want a thirty-day extension, but that whether or not he got the extension, he still was willing to proceed with the deal and close on the property. Defendant stated that plaintiff wanted to develop the property with high-density residential units and told defendant that unless he could do so he would not want the property. Defendant contradicts himself when stating at different times that closing was and was not discussed in the two weeks after the perk test. The proposal letter from the second engineer engaged by plaintiff references residential development only, yet plaintiff states that he considered developing the land for light industry after the perk test results were obtained. After plaintiff and defendant signed the contract, defendant received an offer for substantially more money than plaintiff agreed to pay for the property. After the thirty-day period following the signing of the contract had expired, plaintiff learned from defendant about the third party willing to pay much more for the property.

There is no dispute between the parties as to the meaning of the condition added to the end of the real estate contract. Plaintiff had thirty days from the date of the contract to test the soil to determine whether development would be feasible. However, the contract did not provide a closing date nor discuss how such a date would be determined. Nonetheless, the reference to a thirty-day limit suggests that some action or decision had to be made within thirty days of the signing of the contract.

Despite the apparently less than hoped-for results of the perk test, plaintiff could have continued with the purchase of the land notwithstanding the contingency of the contract. *Brotman v Roelofs*, 70 Mich App 719; 246 NW2d 368 (1976). In *Brotman*, a contingency clause was added to a contract for the purchase of land that made the purchase offer subject to a favorable zoning variance decision. *Id*. at 722. The variance was not granted. *Id*. By that time a third party offered the property owners more money for the land. *Id*. When the property owners requested a release from the contract in order to sell the land to the third party, the buyer refused, stating that he wanted to buy the property notwithstanding the municipality's denial of his zoning request. *Id*. at 722-723. The property owners refused to sell the property to the buyer. *Id*. This Court held that the contingency clause was added to the purchase contract to protect the buyer only. *Id*. at 726. The buyer had the option to waive the contingency before or in a reasonable time after the zoning decision was made. *Id*. at 724-726.

Applying *Brotman* to the facts of the present case reveals the importance of whether plaintiff conveyed a desire to purchase the property within thirty days of the signing of the contract. Because a dispute exists as to whether this occurred, summary disposition was prematurely granted.

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey